

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 08-04388 CW

JAMES SELVITELLA,

Plaintiff and Petitioner,

v.

CITY OF SOUTH SAN FRANCISCO, et al.,

Defendants and Respondents.

ORDER DENYING
PETITION FOR WRIT OF
MANDAMUS AND STAYING
DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

Plaintiff and Petitioner James Selvitella petitions for a writ of mandamus under California Code of Civil Procedure § 1094.5 seeking to overturn the decision by the Personnel Board of the City of South San Francisco to terminate his employment as Battalion Chief of the City's Fire Department. Defendants and Respondents City of South San Francisco, Personnel Board of the City of South San Francisco, South San Francisco Fire Department, Barry M. Nagel, Marty Van Duyn and Phillip White¹ oppose this petition and move for summary judgment on the 42 U.S.C. § 1983 claims also contained in the complaint. Having considered oral argument and all of the papers filed by the parties, the Court denies Plaintiff's petition for a writ of mandamus and stays its ruling on Defendants' motion for summary judgment.

¹Hereinafter, Plaintiff and Petitioner will be referred to as "Plaintiff" and all Defendants and Respondents will be referred to as "Defendants."

BACKGROUND

Plaintiff James Selvitella worked for twenty-five years for the South San Francisco Fire Department. At the time of his termination, he held the position of Battalion Chief. Before the events leading to the present lawsuit, Plaintiff had never been subject to official disciplinary action. After receiving information from an unidentified firefighter that Plaintiff was engaged in illegal gambling activities while on duty and had facilitated the involvement of a subordinate firefighter, Devin Flannery, in these illegal gambling activities, the City of South San Francisco conducted an administrative and criminal investigation into the matter.

When the police interviewed Selvitella on September 24, 2007 about the gambling activities, he denied that anybody other than himself was involved. He stated that he never provided the telephone number for the gambling organization to anybody else and that he would not reveal the names of the people involved in the gambling operation because they were "life-long friends."

On November 14, 2007, Defendant South San Francisco Fire Chief Phillip White issued a notice of proposed discipline to Plaintiff recommending that he be terminated because (1) he engaged in a substantial number of illegal gambling and bookmaking activities while on duty, (2) he encouraged and assisted subordinates to participate in this illegal activity and (3) during the investigation, he made untruthful statements and in some instances refused to cooperate fully with investigators. Chief White stated that these acts constituted violations of the following City of South San Francisco Personnel Rules and Policies:

1 Section 13.01.C.2.e Careless, negligent, unauthorized or
2 improper use of City property, equipment

3 Section 13.01.C.2.i Dishonesty

4 Section 13.01.C.2.m Gross negligence

5 Section 13.01.C.2.n Improper use of authority for personal
6 gain or satisfaction

7 White's notice was based on a South San Francisco Fire
8 Department internal investigation report prepared by Lieutenant Roy
9 Varney. According to the report, Flannery stated that he was
10 involved in gambling with Plaintiff and that in the last two years
11 he had lost approximately \$30,000. Plaintiff collected losses and
12 paid winnings on Flannery's gambling transactions. The report
13 relied on information obtained in the criminal investigation. For
14 instance, the report listed as evidence relied upon: copies of
15 betting sheets obtained pursuant to a search warrant; transcripts
16 of the interrogation of Flannery on July 26, 2007 and of Plaintiff
17 on September 24, 2007; and a "gambling/bookmaking ring" chart made
18 by a police officer assisting in the investigation.

19 In response to White's notice, Plaintiff requested a
20 Skelly hearing.² Assistant City Manager Martin Van Duyn conducted
21 the Skelly hearing on January 7, 2008. The City upheld the
22 proposed decision to terminate Plaintiff's employment. Plaintiff
23 appealed the decision to the City's Personnel Board. Prior to the
24 Personnel Board hearing, Plaintiff requested materials connected to
25 the criminal and administrative investigations into his gambling
26 activities. Specifically, Plaintiff sought the audio recordings

27 ²A Skelly hearing is required under Skelly v. State Personnel
28 Bd., 15 Cal. 3d 194 (1975), when a public employee faces a
potential deprivation of his or her property interest in
employment.

1 and transcripts from interviews related to those investigations.
2 The City produced approximately three hundred pages of documents,
3 but refused to produce documents relating to the ongoing criminal
4 investigation.

5 On the first day of the Personnel Board hearing, Plaintiff
6 moved the Board to compel the City to turn over the following
7 documents and materials: (1) all tapes, transcripts and/or notes
8 pertaining to investigative interviews of Flannery conducted in
9 connection with the criminal investigation; (2) the complete file
10 pertaining to the criminal investigation of Plaintiff, including
11 investigative documents, search warrant affidavits and statements;
12 and (3) the identity and statements of an "informant," who
13 initially disclosed the gambling to the Fire Chief. The Board
14 denied Plaintiff's motion and concluded that the information sought
15 was not relevant to the proceedings. The Board stated:

16 There has been testimony that the City has produced all
17 materials relied on by the City in reaching the decision to
18 terminate Mr. Selvitella on the grounds stated. In City
19 Manager Nagel's Final Notice of Termination, Mr. Nagel wrote
20 that, "I conclude that your conduct of engaging in repeated
21 instances of gambling on duty and using City facilities to
22 gamble, standing alone, warrants your termination. I also
find that your conduct in encouraging, promoting and
facilitating gambling on duty by your subordinate, Devin
Flannery, standing alone, is sufficient grounds for your
termination." The information Mr. Selvitella seeks from the
criminal investigate conducted . . . is not relevant to this
Hearing.

23 AR 23-24. Plaintiff also filed a separate request under the
24 California Public Records Act, which was refused on the ground that
25 these documents were exempt from disclosure because they were part
26 of an ongoing criminal investigation.

27 The hearing before the Personnel Board lasted five days.
28 Thirteen witnesses were examined and cross-examined under oath and

1 over one thousand pages of evidence were admitted. Selvitella was
2 given the opportunity to raise assertions that the decision to
3 terminate him was wrongful, illegal or discriminatory. He
4 testified that he thought he was fired for complaining that Chief
5 White had an "open recruitment" hiring policy for the Deputy Chief
6 position instead of a policy to promote an individual within the
7 fire department. He also stated that his termination may have been
8 in retaliation for challenging Chief White's decisions to promote
9 certain individuals to the captain position.

10 At the hearing, Plaintiff was asked about various gambling
11 activities. He openly admitted to gambling on-duty and to using
12 City telephones to place bets on sporting events through an 800
13 number an average of three calls per work-shift. Over a three-year
14 period, Plaintiff made almost one thousand calls to the 800 number
15 and bet an average of \$500 per week. He stated that he knew that
16 he was engaging in illegal conduct by placing those bets and that
17 he should not have been doing so while on-duty. Plaintiff admitted
18 that his actions were "serious," that he "made a mistake" and that
19 he was "ashamed of what happened."

20 At the hearing, Plaintiff testified that he introduced
21 Flannery to the 800 number and the bookmaking organization.
22 Plaintiff would transmit the money between Flannery and the
23 organization through a runner in the organization. Thus, if
24 Flannery won a bet, the organization would send the money to
25 Plaintiff; and if Flannery lost a bet, the organization would
26 collect the money from Plaintiff. Initially, Flannery's betting
27
28

1 cap was \$1000.³ However, at Flannery's request, Plaintiff
2 negotiated with the organization to raise Flannery's betting cap to
3 \$1500. Occasionally, Plaintiff personally covered some of
4 Flannery's losses. At the peak, Flannery owed Plaintiff about
5 \$4,500. In total, Flannery lost approximately \$30,000 from bets
6 placed through the 800 number, and all of those losses were paid to
7 the organization through Plaintiff.

8 On May 20, 2008, the Board voted unanimously to uphold the
9 City's decision to terminate Plaintiff's employment. The Board's
10 decision stated, in relevant part:

11 After considering all of the relevant evidence offered at the
12 hearing and the arguments of both parties, the Personnel Board
13 voted, unanimously, to uphold the City's decision to terminate
14 Mr. Selvitella's employment, but to extend Mr. Selvitella's
15 leave without pay, begun on December 10, 2007 until February
16 18, 2008. By this ruling of the personnel board, Mr.
17 Selvitella's termination from employment with the City shall
18 become effective February 19, 2009.

16 In extending the date of his termination, the Board
17 acknowledges Mr. Selvitella's long-term record of good
18 performance on behalf of the City and provides him with health
19 benefits. The Board also notes that the termination is
20 warranted based on Mr. Selvitella's acknowledged repeated
21 instances of illegal conduct while on duty.

19 AR 12. Changing the effective date of Plaintiff's termination
20 ensured that he would be eligible to receive lifetime medical
21 benefits.

22 Plaintiff filed the present lawsuit on September 18, 2008.
23 Plaintiff's first cause of action is a petition for a writ of
24 mandamus under California Code of Civil Procedure § 1094.5, seeking
25 to invalidate the Personnel Board's decision to uphold his
26

27 ³The record is not clear whether the betting cap limited each
28 bet or the total amount of money that Flannery could gamble per
week.

1 termination. The second cause of action is brought under 42 U.S.C.
2 § 1983 for deprivation of his substantive and procedural due
3 process rights. Plaintiff alleges that Defendants denied him
4 access to materials that provided the foundation for adverse
5 reports and testimony presented to the Personnel Board. Plaintiff
6 asserts that these documents would have been "material to
7 mitigation or a reduction of discipline." Compl. ¶ 28.

8 On July 20, 2009, the Court granted Defendants' motion to
9 bifurcate the decision on Plaintiff's petition for a writ under
10 § 1094.5 from his § 1983 claim and to stay discovery on the § 1983
11 claim until the Court decides the writ of mandamus.

12 DISCUSSION

13 I. Plaintiff's Petition for a Writ of Administrative Mandamus

14 California law provides the Court with jurisdiction to review
15 a final administrative action "for the purpose of inquiring into
16 the validity" of the decision. Cal. Code Civ. Proc. § 1094.5(a).
17 The Court's inquiry on a petition for a writ under § 1094.5

18 shall extend to the questions of whether the respondent has
19 proceeded without, or in excess of jurisdiction; whether
20 there was a fair trial; and whether there was any prejudicial
21 abuse of discretion. Abuse of discretion is established if
22 the respondent has not proceeded in the manner required by
23 law, the order or decision is not supported by the findings,
24 or the findings are not supported by the evidence.

25 Cal. Code Civ. Proc. § 1094.5(b).

26 The Board's decision in this case affects Plaintiff's
27 fundamental right vested under California law -- his continued
28 public employment. Logan v. Southern Cal. Rapid Transit Dist., 136
Cal. App. 3d 116, 125-26 (1982). Therefore, in "determining under
section 1094.5 whether there has been an abuse of discretion
because the findings are not supported by the evidence, [the

1 reviewing court] must exercise its independent judgment on the
2 evidence and find an abuse of discretion if the findings are not
3 supported by the weight of the evidence." Strumsky v. San Diego
4 County Employees Ret. Ass'n, 11 Cal. 3d 28, 32 (1974).⁴ In
5 exercising its independent judgment, a reviewing court "must afford
6 a strong presumption of correctness concerning the administrative
7 findings, and the party challenging the administrative decision
8 bears the burden of convincing the court that the administrative
9 findings are contrary to the weight of the evidence." Fukuda v.
10 City of Angels, 20 Cal. 4th 805, 817 (1999).

11 Plaintiff argues that the City did not proceed in the manner
12 required by its Rules and Regulations when it disciplined him.
13 City of South San Francisco Personnel Rule § 13.02 provides
14 Plaintiff with the right "to inspect copies of all materials upon
15 which the disciplinary action is based." Plaintiff claims that the
16 City denied him this right because the disciplinary decision was
17 "expressly based upon investigative materials which have never been
18 fully provided to Selvitella." Petition at 14. However, all of
19 the materials upon which the disciplinary action was based were
20 provided to Plaintiff. When Plaintiff received the Notice of
21 Proposed Discipline on November 28, 2007, he also received the
22 Supervisor's investigation report, prepared by Chief White, and
23 Varney's IA report, with all of its attachments. Plaintiff has not
24 identified any other material evidence that was relied upon by the
25

26 ⁴If the administrative decision did not substantially affect a
27 fundamental vested right, the reviewing court's inquiry would be
28 "limited to a determination of whether or not the findings are
supported by substantial evidence in the light of the whole
record." Strumsky, 11 Cal. 3d at 32.

1 City that was withheld from him.

2 Plaintiff also argues that his termination should be reversed
3 because the Board improperly denied his motion to compel on the
4 basis of a lack of relevance. Even with the relaxed standards of
5 admissibility of evidence governing administrative hearings, the
6 evidence admitted must be relevant and reliable. See Aengst v.
7 Board of Medical Quality Assurance, 110 Cal. App. 3d 275, 283
8 (1980) ("Under the rules applicable to administrative proceedings
9 before a [panel of the Medical Quality Review Committee], the
10 evidence must be relevant and reliable."). Here, the Personnel
11 Board acted within its discretion to make a determination about
12 whether evidence was relevant to the proceedings.

13 The subject of the motion to compel was the following
14 documents and materials: (1) tapes, transcripts and notes
15 pertaining to investigative interviews of Flannery taken by all
16 South San Francisco City agencies; (2) the complete file pertaining
17 to the criminal investigation of Plaintiff, including investigative
18 documents, search warrant affidavits and statements; and (3) the
19 identity and statements of an "informant," who initially disclosed
20 the gambling to the Fire Chief. The Board properly denied the
21 motion.

22 As noted above, the entire administrative investigation report
23 and supporting documents were provided to Plaintiff at the same
24 time that he received the Notice of Proposed Discipline. The
25 complete criminal file was not included with this information
26 because it contained information unrelated to Plaintiff and was
27 protected by the official information privilege. Further, during
28 the hearing in front of the Board, Chief White testified that he

1 was not privy to all of the material contained in the criminal
2 investigation and that all of the documents he relied upon to issue
3 his report were produced to Plaintiff. Plaintiff has not been able
4 to identify any specific material evidence that was not provided to
5 him, nor explain how it would have affected the proceedings.

6 Next, Plaintiff argues that the Board's decision should be
7 reversed because it is not supported by any findings related to the
8 charges. Although the Board did not make detailed factual
9 findings, it "considered all of the relevant evidence offered at
10 the hearing and the arguments of both parties," and voted
11 unanimously to adopt the City Manager's decision to terminate
12 Plaintiff. Nevertheless, the Court is not bound by the findings of
13 the hearing body when exercising its independent judicial review,
14 Pittsburg Unified School Dist. v. Commission on Professional
15 Competence, 146 Cal. App. 3d 964, 977 (1983), and the Court
16 independently concludes that the Board properly upheld the findings
17 of the City Manager.

18 The misconduct charges were supported by substantial evidence.
19 The City proved, consistent with Plaintiff's own admissions, that
20 Plaintiff (1) was extensively involved in illegal gambling while on
21 duty and used City telephones and computers to assist him in his
22 efforts, (2) encouraged and assisted a subordinate employee,
23 Flannery, to become engaged in illegal gambling with the gambling
24 organization and (3) was dishonest and failed to cooperate in the
25 ensuing investigation. These facts support the charges in the
26 Notice of Proposed Discipline.

27 Plaintiff asserts that the City abused its discretion by
28 imposing the penalty of termination. The Court is required to

1 uphold the Board's punishment if there is any reasonable basis for
2 sustaining it. Deegan v. City of Mountain View, 72 Cal. App. 4th
3 37, 46 (1999). "The penalty imposed by the administrative body
4 will not be disturbed in the mandate proceeding unless a manifest
5 abuse of discretion is shown. If reasonable minds may differ as to
6 the propriety of the penalty imposed, there has been no abuse of
7 discretion. It is only in the exceptional case, when it is shown
8 that reasonable minds cannot differ on the propriety of the
9 penalty, that an abuse of discretion is shown." Id. at 46-47
10 (internal citations omitted). Here, it was not unreasonable to
11 terminate Plaintiff for his conduct.

12 Finally, Plaintiff argues that he did not receive a fair trial
13 because Chief White improperly targeted him. However, Plaintiff
14 did not offer any evidence of an illegal motive by Chief White
15 related to his termination.

16 For the foregoing reasons, the Court denies Plaintiff's
17 petition for a writ of mandamus and upholds the Personnel Board's
18 decision.

19 II. 42 U.S.C. § 1983 Claim

20 Because the Court denies the writ petition and upholds the
21 Personnel Board's decision, Plaintiff's § 1983 claim may be barred
22 by collateral estoppel or res judicata. In the Ninth Circuit,
23 state administrative adjudications of legal as well as factual
24 issues have preclusive effect in federal court as long as the state
25 proceeding satisfies the requirements of fairness outlined in
26 United States v. Utah Construction & Mining Co., 384 U.S. 394
27 (1966). Miller v. County of Santa Cruz, 39 F.3d 1030, 1032-33 (9th
28 Cir. 1994). Those fairness requirements are "(1) that the

1 administrative agency act in a judicial capacity, (2) that the
2 agency resolve disputed issues of fact properly before it, and
3 (3) that the parties have an adequate opportunity to litigate."
4 Id. (citing Utah Construction, 384 U.S. at 422).

5 Here, these requirements are met. The Board conducted a five-
6 day hearing, during which Plaintiff subpoenaed, examined and cross-
7 examined witnesses. Further, both parties offered hundreds of
8 pages of exhibits into evidence. After hearing oral testimony,
9 reviewing exhibits and hearing counsel's arguments, the Board
10 deliberated and reached a decision to uphold Plaintiff's
11 termination.

12 Once the Utah Construction test is satisfied, the question of
13 preclusion is a matter of state law; federal courts must give the
14 agency's decision "the same preclusive effect to which it would be
15 entitled in the State's Court." University of Tennessee v. Elliot,
16 478 U.S. 788, 799 (1986).

17 Under California law, collateral estoppel applies where it is
18 established that

19 (1) the issue necessarily decided at the previous
20 proceeding is identical to the one which is sought to be
21 relitigated; (2) the first proceeding ended with a final
22 judgment on the merits; and (3) the party against whom
23 collateral estoppel is asserted was a party or in privity
24 with a party at the first proceeding.

25 Hydranautics v. FilmTec Corp., 204 F.3d 880, 885 (9th Cir. 2000)
26 (citing Younan v. Caruso, 51 Cal. App. 4th 401, 406-07 (1996)).

27 Plaintiff's § 1983 claim that the Personnel Board violated his
28 procedural and substantive due process rights is the same as his
claim for relief under § 1094.5. As noted above, the Court's
inquiry on a petition for a writ under § 1094.5

1 shall extend to the questions of whether the respondent has
2 proceeded without, or in excess of jurisdiction; whether
3 there was a fair trial; and whether there was any prejudicial
4 abuse of discretion. Abuse of discretion is established if
the respondent has not proceeded in the manner required by
law, the order or decision is not supported by the findings,
or the findings are not supported by the evidence.

5 Cal. Code Civ. Proc. § 1094.5(b). Plaintiff's § 1983 claim that he
6 was denied due process because the Personnel Board denied his
7 motion to compel necessarily involves the issue of whether he
8 received a "fair trial" and whether there was any "prejudicial
9 abuse of discretion." Moreover, the factual allegations underlying
10 Plaintiff's § 1983 claim that Defendants terminated him as a form
11 of retaliation, for complaining about the manner in which Chief
12 White promoted employees, were presented to the Personnel Board.
13 The Board determined that the City's decision to terminate
14 Plaintiff was proper; therefore, that decision necessarily
15 encompassed the issue of whether the termination was wrongfully
16 based on retaliation by Chief White. Accordingly, the issues
17 necessarily decided by the Board are identical to those that
18 Plaintiff seeks to relitigate in his § 1983 claims before this
19 Court. The third requirement of collateral estoppel is satisfied
20 because the party against whom collateral estoppel is asserted,
21 Plaintiff, was a party in the administrative hearing.

22 However, at the hearing on these motions, the parties
23 acknowledged that this Court's decision on the § 1094.5 claim is
24 not a final judgment on the merits. The claim will not be final
25 until an appeal from the Court's judgment has been exhausted or the
26 time to appeal has expired. Franklin & Franklin v. 7-Eleven Owners
27 for Fair Franchising, 85 Cal. App. 4th 1168, 1174 (2000). To allow
28 Plaintiff to appeal the Court's decision on the § 1094.5 claim, the

1 Court must enter judgment on that claim. Under Federal Rule of
2 Civil Procedure 54(b), the Court may enter judgment on fewer than
3 all claims in a case. That rule provides,

4 When an action presents more than one claim for relief--
5 whether as a claim, counterclaim, crossclaim, or third-party
6 claim--or when multiple parties are involved, the court may
7 direct entry of a final judgment as to one or more, but
8 fewer than all, claims or parties only if the court
9 expressly determines that there is no just reason for delay.

10 A court has discretion in determining whether a Rule 54(b) judgment
11 should enter. See Wood v. GCC Bend, LLC, 422 F.3d 873, 878 (9th
12 Cir. 2005) (citing Curtiss-Wright Corp. v. Gen. Elec. Co., 446 U.S.
13 1, 8 (1980)). In exercising its discretion, a court must consider
14 "judicial administrative interests as well as the equities
15 involved. Consideration of the former is necessary to assure that
16 application of the Rule effectively 'preserves the historic federal
17 policy against piecemeal appeals.'" Curtiss-Wright, 446 U.S. at 8
18 (citation omitted).

19 Here, if the § 1094.5 claim is resolved as a final judgment on
20 the merits, it may be used preclusively as a defense to the § 1983
21 claim. This course could risk piecemeal appeals: if the § 1094.5
22 judgment is affirmed and then applied as collateral estoppel to the
23 § 1983 claim, a second appeal could ensue. On the other hand, if
24 it is not appealed, the § 1983 claim would proceed first and
25 Defendants would not be able to claim their collateral estoppel
26 defense. Proceeding to discovery and a full jury trial on the
27 § 1983 claim without waiting for a final judgment on the § 1094.5
28 claim risks unnecessary waste of the parties' and the Court's
resources. Accordingly, pursuant to Federal Rule of Civil
Procedure 54(b), the Court finds that "there is no just reason for

1 delay" and enters final judgment on the § 1094.5 claim. The
2 parties shall notify the Court once the appeal has been exhausted
3 or the time to appeal has expired.

4 Plaintiff argues that the Court should deny the summary
5 judgment motion under Federal Rule of Civil Procedure 56(f). Rule
6 56(f) of the Federal Rules of Civil Procedure provides that the
7 court may deny or continue a motion for summary judgment "[i]f a
8 party opposing the motion shows by affidavit that, for specified
9 reasons, it cannot present facts essential to justify its
10 opposition." The requesting party must show (1) it has set forth
11 in affidavit form the specific facts it hopes to elicit from
12 further discovery, (2) the facts sought exist and (3) the sought-
13 after facts are essential to oppose summary judgment. Family Home
14 and Finance Center, Inc. v. Federal Home Loan Mortgage Corp., 525
15 F.3d 822, 827 (9th Cir. 2008). The general rule is that § 1094.5
16 claims are decided "solely on the record of the proceeding before
17 the administrative agency." Toyota of Visalia, Inc. v. New Motor
18 Vehicle Bd., 188 Cal. App. 3d 872, 881 (1987). Furthermore,
19 Plaintiff has not shown that further discovery on the § 1094.5
20 claim would uncover evidence that would allow him successfully to
21 oppose judgment against him on that claim. Therefore, the Court
22 does not defer its ruling on the § 1094.5 claim.

23 The Court stays its decision on Plaintiff's § 1983 claim.
24 Discovery on that claim will be unnecessary if the § 1094.5 claim
25 becomes final and collateral estoppel applies. However, the Court
26 will re-visit discovery issues if the § 1094.5 judgment is not
27 finalized.

CONCLUSION

For the foregoing reasons, the Court denies Plaintiff's petition for a writ of mandamus and stays its decision on Defendants' motion for summary judgment on Plaintiff's § 1983 claim pending appeal of this order (Docket No. 59). The Court also stays discovery and further litigation of that claim. The Court denies as moot Defendants' motion to quash a subpoena for a non-party's bank records (Docket No. 23) and Plaintiff's motion to compel compliance with third-party deposition subpoenas (Docket Nos. 23 and 41). The parties may re-file these motions if discovery is re-opened in this case after the Ninth Circuit's decision. The clerk shall enter judgment for Defendants on the § 1094.5 claim. The parties shall bear their own costs.

IT IS SO ORDERED.

Dated: 12/24/09



CLAUDIA WILKEN
United States District Judge